Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	**MM Docket No. 93-228**
	)	
Amendment of Section 73.202(b),	)	**RM-8295**
Table of Allotments,	)	
FM Broadcast Stations.	)	
(Tawas City, Michigan)	)	

TO: Acting Chief, Allocations Branch

PETITION FOR RECONSIDERATION

Now comes Patricia Mason ("Mason" or "Petitioner") who has participated previously in this proceeding by the filing of Comments and Reply Comments, and respectfully requests that the Acting Chief, Allocations Branch, reconsider that Report and Order released September 7, 1994, whereby, inter alia, he amended Section 73.202(b) of the Commission's rules to read as follows:

Community	Channel No.
Tawas City, Michigan	277A, 284C2, 291A

and modified the license of Station WHST(FM) to specify operation on channel 291A instead of channel 297A at Tawas City, Michigan.

At the outset, it must be noted that as the Commission recites in its Notice of Proposed Rule Making released August 5, 1994:

> In order to permit operation of Station WDBI-FM as a six kilowatt facility, petitioner seeks to eliminate the short spacing between the domestic WDBI-FM facility and the foreign allotment by substituting Channel 291A for Channel 297A at Tawas City.

This statement is directly contrary to information recently discovered in Commission files; to wit, that WHST-FM (then WDBI)

was granted authority to increase power to 6 kw on Channel 297A, with Canadian concurrence, with its licensed facilities. A copy of this authority is attached to this pleading.

Moreover, licensee was fully aware of this authority and some two years after its grant, requested authority to begin 6 kw operation. That request was subsequently withdrawn. See letter of counsel dated August 16, 1993.[1]

The grant of prior 6 kw authority was not mentioned in Ives' original Petition for Rule Making, leading the Commission to believe that WHST was precluded from increasing its power to 6 kw, so therefore a change of channel was required.

If indeed deception, misrepresentation or lack of candor is involved, licenses have been revoked for less.[2]

BACKGROUND

1. The foregoing notwithstanding, Mason seeks reconsideration based on the following additional facts and arguments. By a petition filed July 9, 1993, Ives Broadcasting, Inc. ("Ives" or "WHST(FM)") sought allotment of Channel 291A at Tawas City vice its present channel 297A and modification of its license to operate on the lower channel, contending that its present operation at 3 kw

[1] For some unexplained reason, a duplicate letter was filed August 23, 1993.

[2] Oh, what a tangled web we weave
when first we practice to deceive.
Scott, Marmion

was precluded from increase to 6 kw by short spacing to an Ontario, Canada station on 297C.

2. In her Comments, Mason pointed out that with a site move of but 4.29 km, Ives could increase to 6 kw on its present channel, thus obviating the necessity to change channels. In Reply Comments, Ives urged that Mason had not provided "evidence that such a new location can be found within local zoning or building code requirements." Indeed, the Commission should have recognized that Ives would put the shoe on the wrong foot: it is incumbent upon a potential applicant to demonstrate that no sites are available in an area that would provide adequate spacing.[3] Throughout this proceeding Mason has not objected to allotment of Channel 291A to Tawas City but rather to the star-chamber proceeding where the license of WHST(FM) would be modified without opportunity for Mason (and any other interested parties) to apply for the preferred channel. It may be observed parenthetically that when and if the Acting Chief reconsiders and permits applicants to seek Channel 291A, Mason will be amongst them.

ARGUMENT

3. The law is apparently well settled that the Commission can, in a rule making proceeding, substitute FM channels and modify

---

[3] In its said Report and Order, the Commission stated that Channel 277A could be allotted to Tawas City with "a site restriction of 4.8 km. . ." but did not venture whether "a new location can be found within local zoning or building code requirements." Nor does the Commission state whether Channel 277A at Tawas City can employ 6 kw rather than the basic 3 kw for Class A stations.

the license of an existing station to specify the newly allotted channel, provided there is either no interest in the proposed channel, or if an interest is expressed, an additional equivalent class of channel is made available for the community. (§1.420(g)(2)). In this case, Mason has expressed an interest in Channel 291A; thus, this proceeding turns upon whether the Commission, in its Report and Order, has provided "an equivalent channel" for Tawas City. In its Report and Order, the Commission has relied upon Section 1.420(g) of the rules and upon Vero Beach, Florida, 3 FCC Rcd 1049 (1988), rev. den., 4 FCC Rcd 2184, 2185 (1989), but nowhere has it defined the term "equivalent channel". Indeed, the Commission is stopped from classifying channels 291A and 277A as equivalent channels. An applicant for Channel 291A may employ power of 6 kw. (The reason stated by Ives for the proposed change) but Channel 277A is restricted to 3 kw. Moreover, Channel 291A can be reclassified to C3 status and operation at 25 kw proposed. Channel 277A enjoys no such opportunity.[4] Thus, all Class A channels are not created equal, unlike all men. For the Commission to consider all Class A channels as equivalent is fatuous indeed, when some may employ higher power or may opt for upgrading to Class C3 is fatuous.

4. Likewise, for the Commission to postulate that since Ives has not yet indicated that it will attempt to upgrade to C3, the

---

[4] Vero Beach involved Class C2 channels, not Class A channels, and was decided March 7, 1988 (review denied March 6, 1989) before the Commission permitted Class A stations to increase to 6 kw, October 2, 1989.

Commission need not consider that possibility is defiant of reason, particularly since Mason and any other party will be precluded from protesting such an upgrade by Commission rules for same-channel upgrades.[5]

5. In Vero Beach, the Commission considered one of the bedrock decisions of communications law:

> As stated earlier, Ashbacker stands for the proposition that the Commission can not award a license without granting a timely competing proposal the comparative consideration required by our own rules. See also Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987). This, however, does not preclude the Commission from establishing eligibility standards that obviate the need for individual hearings before the denial of an application. See U. S. v. Storer Broadcasting Co., 351 U.S. 192 (1956). In full accord with both Ashbacker and Storer Broadcasting, supra, we established in Modification of FM and TV Station Licenses that only the petitioner for the new channel is eligible to apply for a station on the requested channel when there is either no interest in the proposed channel or, if an interest is expressed, an additional equivalent class of channel is made available for the community. Thus, in addition to being consistent with Ashbacker, this procedure achieves the public interest benefit of encouraging existing stations to upgrade their service to the public by rewarding their efforts to identify candidate channels for an upgrade. As long as we place an interested party in a comparative position as favorable as if it were allowed to compete for an upgraded channel first proposed by another party. Ashbacker is inapplicable.

Mason has not, by the Report and Order in this proceeding, been placed in a comparative position as favorable as if she were allowed to compete for an upgraded channel first proposed by Ives.

---

[5] Were the Commission in a final order to condition allotment of Channel 291A to Tawas City upon its remaining a Class A channel, it would obviate the second of the above-noted discrepancies between Channel 291A and Channel 277A.

As a second-class citizen, Mason would be obliged to take the leavings while Ives upgrades first to 6 kw and then to 25 kw, the latter being secure from a petition to deny by Mason or any other interested party.

6. By the procedure proposed here, the Commission would nibble away at Ashbacker by an "equivalent class of channel" phrase, pre-supposing that all channels of the same class are equivalent. This is patently untrue: as the Commission recognizes, AM frequency 1600 kHz is not equivalent to 540 kHz; UHF channel 833 is not equivalent to channel 13 (and the Commission has permitted stations to move to lower UHF frequencies in order to improve coverage and reception). Nor is Channel 277A equivalent to Channel 291A.

7. The Commission presumably does not have the staff to evaluate each FM channel to compare its relative merit through study of site availabilities, likelihood of FAA approval, coverage areas, etc. but when the discrepancies between channels are as flagrant as here presented, a doubling of power and opportunity to upgrade to a higher class without the possibility of opposition from other applicants, the channels are by no means equivalent and Ashbacker requires acceptance of competing applications and comparative consideration through administrative hearing. It is indeed fatuous for the Commission to hand Petitioner a channel with significant potential while according to other interested parties a channel of relatively little worth - and at the same time piously pronounce the two "equivalent".

Conclusion

8. The Commission should conduct a formal investigation of the bona fides of Ives' representation in this proceeding and based upon the results thereof, institute sanctions against WHST.

9. Additionally, the Commission's staff should reconsider its Report & Order released September 7, 1994 which provided a bonanza for petitioner and a relatively unsatisfactory channel for Patricia Mason and any other party or parties interested in applying for authority to construct a new FM broadcast station at Tawas City, Michigan. As an alternative, this matter should be certified to the Commission for a policy determination as to what constitutes "equivalent channels" in the FM band.

Respectfully submitted,

PATRICIA MASON

By 
Julian P. Freret
Her Counsel

BOOTH, FRERET & IMLAY
1233 20th Street, N. W.
Suite 204
Washington, D. C. 20036
(202) 296-9100

October 7, 1994

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

3 JUN 1991

Tawas City Broadcasting Company
Radio Station WDBI-FM
1175 South U.S. 23
Tawas City, MI 48763

IN REPLY REFER TO:
8920-DEB

In re: WDBI-FM; Alma, MI
Tawas City Broadcasting Co.
Request to Increase ERP
via Form 302

Gentlemen:

This letter is reference to your attorney's letter dated May 9, 1990 requesting authority to increase the effective radiated power (ERP) of Class A station WDBI-FM to the equivalent of maximum Class A facilities.[1] The May 9, 1990 letter notes that the channel for WDBI-FM was recently changed from Channel 269A to Channel 297A and that WDBI-FM is fully spaced on its new frequency. Consequently, you believe that WDBI-FM should be included on the list of stations eligible to upgrade via FCC Form 302 (see the Commission's Public Notice, Reference No. 451, released November 3, 1989 and the Second Report and Order in Docket 88-375, 4 FCC Rcd 6375 (1989)).

Our review indicates that your analysis is correct. Further, the Canadian government has within the past few days indicated that it has no objection to WDBI-FM operating as proposed. Accordingly, WDBI-FM IS HEREBY GRANTED AUTHORITY to commence operations on Channel 297A with the facilities licensed in BMLH-900509KD with an effective radiated power up to 6.0 kW, subject to the restrictions set forth in the Commission's November 3, 1989 Public Notice (copy enclosed, without attached lists). Provided those conditions are met, WDBI-FM must file FCC Form 302 (Sections I and II-B) in triplicate within 10 days of commencing operations with the new facilities. THIS APPLICATION MUST CONTAIN A COPY OF THIS LETTER AND THE SUPPLEMENTAL EXHIBIT ATTACHED TO THE PUBLIC NOTICE. This authority is effective as of the date of this letter.

Sincerely,

Dale E. Bickel

Dale Bickel
Supervisory Electronics Engineer
FM Branch
Audio Services Division
Mass Media Bureau

cc: Arent, Fox, Kintner, Plotkin & Kahn

---

[1] This letter was attached to license application BMLH-900509KD which covered the change in frequency of WDBI-FM th Channel 297A. It was not realized that this letter requested a separate action from the staff until that license application had been reached in turn for processing.

PEPPER & CORAZZINI
ATTORNEYS AT LAW
200 MONTGOMERY BUILDING
1776 K STREET, NORTHWEST
WASHINGTON, D.C. 20006
(202) 296-0600

VINCENT A. PEPPER
ROBERT F. CORAZZINI
PETER GUTMANN
JOHN F. GARZIGLIA
NEAL J. FRIEDMAN
ELLEN S. MANDELL
HOWARD J. BARR
LOUISE CYBULSKI #
JENNIFER L. RICHTER #
NOT ADMITTED IN D.C.

ROBERT LEWIS THOMPSON
GREGG P. SKALL
E. THEODORE MALLYCK
OF COUNSEL
FREDERICK W. FORD
1909-1986

TELECOPIER (202) 296-5572

August 23, 1993

Mr. Dennis Williams, Chief
FM Branch
Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 332
Washington, D.C. 20554

Re: WHST-FM, Tawas City, Michigan
(Formerly WDBI-FM)
Withdrawal of 6 kw Request

Dear Mr. Williams:

On April 7, 1993, on behalf of the licensee, Ives Broadcasting, Inc., I requested authority for the above-referenced station to begin six kilowatt equivalent operation. The licensee is now pursuing another method of improving the station's performance. Therefore, I hereby request that the request of April 7 be withdrawn.

Thank you for your cooperation. If you have further questions with respect to this request, please contact the undersigned.

Respectfully submitted,

Gregg P. Skall
Counsel to Ives Broadcasting, Inc.

cc: Mr. David Karschnick

GPS/tsw
c:\wp\5033\810williams.gps

PEPPER & CORAZZINI
ATTORNEYS AT LAW
200 MONTGOMERY BUILDING
1776 K STREET, NORTHWEST
WASHINGTON, D.C. 20006
(202) 296-0600

VINCENT A PEPPER
ROBERT F. CORAZZINI
PETER GUTMANN
JOHN F. GARZIGLIA
NEAL J. FRIEDMAN
ELLEN S. MANDELL
HOWARD J. BARR
LOUISE CYBULSKI #
JENNIFER L. RICHTER #
NOT ADMITTED IN D.C.

ROBERT LEWIS THOMPSON
GREGG P. SKALL
E. THEODORE MALLYCK
OF COUNSEL
FREDERICK W. FORD
1909-1986
TELECOPIER (202) 296-5572

August 16, 1993

Mr. Dennis Williams, Chief
FM Branch
Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 332
Washington, D.C. 20554

Re: WHST-FM, Tawas City, Michigan
(Formerly WDBI-FM)
Withdrawal of 6 kw Request

Dear Mr. Williams:

On April 7, 1993, on behalf of the licensee, Ives Broadcasting, Inc., I requested authority for the above-referenced station to begin six kilowatt equivalent operation. The licensee is now pursuing another method of improving the station's performance. Therefore, I hereby request that the request of April 7 be withdrawn.

Thank you for your cooperation. If you have further questions with respect to this request, please contact the undersigned.

Respectfully submitted,

Gregg P. Skall
Counsel to Ives Broadcasting, Inc.

cc: Mr. David Karschnick

GPS/tsw
c:\wp\5033B\810williams.gps

CERTIFICATE OF SERVICE

I, Margaret A. Ford, Office Manager in the law firm of Booth, Freret & Imlay, do hereby certify that copies of the foregoing PETITION FOR RECONSIDERATION were mailed via U. S. Mail, first class, postage prepaid, this 7th day of October, 1994, to the offices of:

Gregg P. Skall, Esquire
Pepper & Corazzini
1776 K Street, N. W., Suite 200
Washington, D. C. 20006

Margaret A. Ford